IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 136 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @ To be referred to the Reporter or not? Yes @

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

NEW HAVEN BEARING PVT. LTD.

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR KC PATEL for Petitioner

MR MIHIR JOSHI for MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE
Date of decision: 18/12/98

ORAL JUDGEMENT (per A.R. Dave, J.)

The Income Tax Appellate Tribunal, Ahmedabad Bench 'A', has referred to this court the following questions for its opinion under the provisions of sec. 256(2) of the Income-tax Act, 1961.

"1. Whether, on the facts and in the circumstances of the case, the tribunal was right in law in holding that the receipts of Rs. 21,459/- for A.Y. 1978-79 and Rs. 23,430/- for A.Y. 1979-80 on sale of import entitlements were taxable as the "business income" of the appellant?"

2. Whether, on the facts and in the circumstances of the case, the tribunal was right in law in holding that the import entitlements were not a capital asset but a benefit taxable u/s. 28(iv) of the Act?

3. Whether, on the facts and in the circumstances of the case, the tribunal was right in law in holding that the ceiling limit of 10% prescribed under sec. 80G(4) of the Income-tax Act, 1961 applied to the quantum of actual deduction admissible under that section and not to the aggregate amount of qualifying donation referred to in that section?

4. Whether, on the facts and in the circumstances of the case, the tribunal was right in law in holding that the disallowance of interest of Rs. 26,432/- for A.Y. 1979-80, Rs. 60,389/- for A.Y. 1980-81 and Rs. 108888/- for A.Y. 81-82 paid on advertisement by directors and their family members u/s 40A(8) of the Act was not justified?"

Questions Nos. 1 and 2 have been referred to at the instance of the assessee whereas questions Nos. 3 and 4 have been referred to at the instance of the revenue.

2. So far as questions Nos. 1 and 2 are concerned, learned counsel appearing for the appellant assessee has fairly submitted that the said questions are now no more

res integra in view of the provisions of sec. 28(iiia) of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). For the Assessment Years 1978-79 and 1979-80 the assessee had received certain amount on sale of import entitlements. For A.Y. 1978-79 the assessee received Rs. 21,459/- whereas for A.Y. 1979-80, the assessee had received Rs. 22430/-. The assessee had submittd in its returns and before the ITO that the said amounts received by the assesee company were in the nature of capital receipts and therefore they should not be taxed as revenue receipts. The said submission was rejected by the ITO and the said sums were taxed as revenue receipts. Being aggrieved by the said decision of the ITO, the assessee had filed an appeal before the CIT (Appeals) but the CIT (Appeals) rejected the contention raised before him by the assessee in view of the decision delivered in case of Agra Chain Manufacturing Co. v. CIT reported at page 840 of 114 ITR. Being aggrieved by the said decision, the assessee had approached the ITAT but the tribunal also held against the assessee by coming to the conclusion that the said amounts were in the nature of revenue receipts and they were rightly taxed by the ITO.

3. In view of amendment in sec. 28 of the Act, the relevant portion of the section operating at the relevant time is as under:-

"Sec. 28(iiia): profits on sale of a licence granted under the Imports (Control) Order, 1955, made under the Imports and Exports (Control) Act, 1947 (18 of 1947)"

4. The said section has come into force with effect from 1.4.1962. In view of the said legal position, the learned advocate appearing for the assessee has fairly conceded that the said two issues will have to be decided in favour of the revenue by holding that the receipts in question were of revenue nature and therefore they were rightly taxed as revenue receipts.

5. So far as Question No. 3 is concerned, the learned advocates appearing for the respective parties have argued at length. Before dealing with the arguments it would be worthwhile to narrate the circumstances in which the said question has arisen. The relevant facts are as under:-

6. The assessee had donated a sum of Rs. 50,000/- during A.Y. 1977-78. His gross total income for the said year was Rs. 4,76,616/- as per the return filed by

him. The assessee had claimed 50% of the amount of donation being Rs. 25,000/- as deduction under provisions of Sec. 80G of the Act. The ITO did not allow the deduction as claimed by the assessee. Being aggrieved by the said assessment with regard to deduction of donation u/s 80G of the Act, the assessee had preferred an appeal before the Appellate Assistant Commissioner of Income-tax. The AAC rejected the appeal by observing that the deduction allowed by the ITO was just and proper.

7. Being aggrieved by the said decision rendered by the AAC, the assessee had filed an appeal before the Tribunal and the said appeal was allowed. In the circumstances, the third issue has been raised at the instance of the revenue.

8. For the purpose of considering deduction under provisions of sec. 80G, the ITO, first of all, arrived at 10% of the gross total income of the assessee and thereafter he deducted a further sum to the extent of 50% of the said amount for the purpose of arriving at the maximum amount of deduction. The ITO was of the view that deduction u/s 80G(1) and 80G(4) are to be read in such a manner that an assessee can get deduction only to the extent of 50% of the 10% of the gross total income of an assessee. The contention of the assessee was that 50% of the amount donated should be deducted from his income subject to maximum ceiling of 10% of the gross total income.

9. As stated hereinabove, even before the AAC in the appeal, the assessment arrived at by the ITO was upheld. The tribunal, following judgment deliverd in the case of Hyderabad Race Club v. Addl. Commissioner of Income-tax, A.P., 120 ITR 185 and in view of circular No. 281 dated 22.9.80 issued by the CBDT, the Tribunal acepted the contention raised by the assessee.

10. Learned Advocate Shri Mihir Joshi appearing for the revenue has submitted that the view expressed by the tribunal is unjust and improper in view the judgments delivered in the cases of CIT v. Canara Bank, 162 ITR 478 and CIT v. New Shorrock Spg & Mfg. Co. Ltd., 212 ITR 355. It has been submitted by the learned advocate that as per the provisions of sec. 80G(1) and (4), the assessee cannot have deduction in excess of 50% of the 10% of the gross total income of the assessee. He has submitted that sub-sections (1) and (4) of sec. 80G are to be read together and upon harmonious reading of the said subsections, their effect is as stated hereinabove.

We are not recording the submissions in detail as they are discussed at length in the judgments referred to hereinabove.

11. On the other hand, learned advocate Shri R.K. Patel appearing for the assessee has submitted that provisions of sec. 80G(1)and (4) set up two different types of limits. It has been submitted by him that according to the provisions of sec. 80G(1), the extent of deduction is prescribed whereas provisions of sec. 80G(4) sets up the maximum limit to which overall deduction can be granted in respect of donations given by an assessee. He has therefore submitted that, first of all, deduction which an assessee is entitled to is to be determined as per provisions of sec. 80G(1) and only thereafter it is to be seen whether the amount so determined exceeds the overall limit set up by the provisions of sec. 80G(4)) of the Act. He has submitted that his submissions are also supported by the judgments delivered in cases of Hyderabad Race Club v. Addl. Commissioner of Income-tax, 120 ITR 185 and in CIT v. Lukwah Tea Co. Ltd., (1992) 107 CTR 11.

12. Relevant portion of Sec. 80G, which was in force at the relevant time, reads as under:

"80G(1) In computing the total income of an assessee, there shall be deducted, in accordance with and subject to the provisions of this section,--

(i) in a case where the aggregate of the sums specified in sub-section (2) includes any sum specified in sub-clause (vii) of clause (a) thereof, an amount equal to the whole of such sum plus fifty per cent of the balance of such aggregate; and

(ii) in any other case, an amount equal to fifty per cent of the aggregate of the sums specified in sub-section (2)."

"80G(4) The deduction under sub-section (1) shall not be allowed in respect of such part of the aggregate of the sums referred to in sub-clauses (iv), (v) (vi) and (vii) of clause (a) and in clause (b) of sub-section (2) as exceeds ten per cent of the gross total income (as reduced by any portion thereof on which income-tax is not payable under any provision of this Act and by any amount in respect of which the assessee is entitled to a deduction under any other provision of this Chapter), or five hundred thousand rupees,

whichever is less."

13. Both the learned advocates are supported by decisions rendered on the subject by different High Courts. Jurisdictional High Court, that is, the High Court of Gujarat, has not rendered any decision on the subject. In the circumstances, learned advocate Shri R.K. Patel has also submitted that when two views are possible, the view beneficial to the assessee should be accepted. The said contention was duly considered in CIT v. New Shorrock Spg. and Mfg. Co. Ltd. but it was negatived. We also do not propose to accept the said submission as we would like to decide the matter on merits without upholding the said submission.

14. After hearing the concerned learned advocates at length, we are of the view that the assessee should succeed for the reasons very much recorded in judgment delivered in Hyderabad Race Club v. Addl. CIT, A.P., 120 ITR 185.

15. We are also of the view that there is a sound reason to accept the view expressed in the case of Hyderabad Race Club (supra). In our opinion, two different types of limits have been set up under the Act for giving deduction under provisions of sec. 80G of the Act.

16. The first limit is with regard to the extent to which deduction can be granted to an assessee for the donations given by the assessee. In the instant case we are concerned with donations covered under the provisions of sec. 80G(1)(ii) and we are not concerned with the donations covered under the provisions of section 80G(1)(i) and therefore we limit our discussion only with regard to the donations to which the provisions of sec. 80G(1)(ii) are applicable. As per the said sub-section, it is very clear that the assessee is not entitled to deduction of the entire amount donated by him but he is entitled to deduction only to the extent of 50% of the aggregate of the sums donated by him. The said deduction has nothing to do with the total income earned by the assessee at the time of calculating the extent to which the amount is to be deducted.

17. Once the extent to which the amount of donation to be deducted is arrived at, another limit, namely, maximum amount which can be deducted, as set out in sec. 80G(4) comes into play. The said sub-section sets up an overall limit which is 10% of the gross total income or Rs. 500,000, whichever is less. The limit prescribed

under the provisions of sec. 80G(4) has been changed from time to time but at this stage, we are not concerned with the actual amount but we are on the principle as to how the total amount to be deducted from the income of the assessee u/s 80G is to be arrived at.

18. As stated hereinabove, first of all, the extent to which the donation to be deducted is to be ascertained under the provisions of sec. 80G(1). If the amount so arrived at is not in excess of the maximum ceiling put up under the provisions of sec. 80G(4), then the assessee is entitled to have the entire amount deducted from his income but if the amount arrived at under the provisions of sec. 80G(1) is in excess of the maximum ceiling set up under the provisions of sec. 80G(4), the amount which is in excess of the said ceiling shall not be deducted from the income. In other words, maximum limit in such case would be the limit set up under sec. 80G(4).

19. Upon close reading of sec. 80G(4) of the Act, it is very clear that the deduction shall not be allowed in respect of such part of the aggregate of the sums which exceeds 10% of the gross total income or Rs. Rs. 500,000, whichever is less. As the above-referred limit is concerned with the overall maximum limit under the provisions of sec. 80G of the Act, we are of the view that the said issue should be decided in favour of the assessee. Nowhere in the section it has been stated that only 50% of the 10% of the gross total income should be deducted from the assessee's income by way of deduction u/s 80G. To read the section in such a manner would therefore not be just and proper.

20. In the circumstances, we are of the view that the question deserves to be decided in favour of the assessee.

21. So far as question No. 4 is concerned, the said issue is now no more res integra in view of the judgement delivered in case of Agew Steel Manufacturers Pvt. Ltd. v. CIT, 209 ITR 77. The learned advocates appearing for the respective parties have fairly submitted that the said issue has been decided by the above-referred judgment and therefore without entering into further controversy, we are deciding the said issue in favour of the revenue.

22. Thus, questions Nos. 1 and 2 are decided in affirmative, that is, against the assessee and in favour of the revenue. Question No. 3 is decided in affirmative, that is, in favour of the assessee and

against the revenue and question No. 4 is decided in affirmative, that is, in favour of the revenue and against the assessee. The reference is answered accordingly. There shall be no order as to costs.

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